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Some Aspects of Appellate Procedure In Ohio

Judge Lee E. Skeel

CONSTITUTIONAL AND STATUTORY AUTHORITY FOR APPELLATE JURISDICTION IN OHIO

The right to appeal a decision of an administrative agency or the judgment or final order of a court is made available to litigants by the Ohio Constitution¹ and statutes enacted pursuant thereto.² In taking an appeal, there must be strict compliance with the authority which creates the right to appeal.

The law dealing with appeals is based upon article IV of the Ohio Constitution, which defines the scope of judicial power in Ohio and vests

that power in certain courts.

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Article IV creates the supreme court and the court of appeals and spells out their jurisdiction; it establishes the probate court and defines its jurisdiction; it creates the common pleas court,

and confers upon the legislature the power to define the jurisdiction of that court, and to create and establish the jurisdiction of other courts inferior to the court of appeals. In the exercise of this authority, the jurisdiction of the common pleas court has been provided;³ and the juvenile court,⁴ the municipal court,⁵ the mayor's court⁶ and the county court⁷ have been established and the jurisdiction of each defined.

Jurisdiction of the Ohio Supreme Court

As provided by article IV, sections 2 and 6, the supreme court has original jurisdiction of the five prerogative writs: quo warranto, mandamus, habeas corpus, prohibition and procedendo. The court is vested with appellate jurisdiction in the following cases: all cases involving questions arising under the federal and Ohio constitutions; felony cases, on leave first obtained; cases which originate in the court of appeals;

1. OHIO CONST. art. IV, § 6.
2. OHIO REV. CODE ch. 2505.
3. OHIO REV. CODE §§ 2305.01, .07.
4. OHIO REV. CODE § 2151.23.
5. OHIO REV. CODE §§ 1901.01, .02, .17, .20.
6. OHIO REV. CODE §§ 1905.01, .02, .09, .19, .20.
7. OHIO REV. CODE §§ 1907.011, .012, .021, .031.

cases of public or great general interest in which the supreme court directs the court of appeals to certify its record for review in the supreme court; cases in which a court of appeals renders a decision which is in conflict with the decision of another court of appeals, and the court certifies its record to the supreme court for final determination.

The Ohio Constitution also vests the supreme court with such revisory jurisdiction of the proceedings of administrative officers as may be provided by law.⁸ Pursuant to this provision, the legislature has conferred upon the supreme court revisory jurisdiction for appeals from final orders of the Board of Tax Appeals⁹ and of the Public Utilities Commission.¹⁰

There are three sections of the Revised Code which provide for direct appeals to the supreme court in situations other than those already mentioned. These sections are separately mentioned because they require special consideration. Section 2709.36 of the Code, part of the chapter dealing with the appropriation of property, authorizes an action in either the probate court or the common pleas court to appropriate or condemn part or all of an unfinished railroad bed in certain specified circumstances.¹¹ The section concludes: "Appeals from such court of common pleas may be commenced directly in the supreme court." This provision raises a serious constitutional question for the reason that direct appeals to the supreme court are constitutionally authorized only in cases which originate in the court of appeals, or in appeals from administrative officers or agencies as provided by law.¹² The appeal here provided falls within none of these categories.

The second section to be considered is found in chapter 3515 which deals with the contest of elections. The sections preceding section 3515.15 provide for filing a petition in the proper court and the procedure to be followed in contesting an election.¹³ Section 3515.15 then provides in part: "The person against whom judgment is rendered in a contest of election may appeal on questions of law within twenty days, to the supreme court." The authority for this provision is article II, section 21, of the Ohio Constitution, which provides: "The General Assembly shall determine by law, before what authority and in what manner the trial of contested elections shall be conducted." It should also be noted that section 3515.15 provides: "The laws and rules of the court governing appeals apply in the appeal of contested election cases."

8. OHIO CONST. art. IV, § 2.

9. OHIO REV. CODE § 5717.04.

10. OHIO REV. CODE § 4903.12.

11. OHIO REV. CODE §§ 2709.33, .35.

12. OHIO CONST. art. IV, § 2.

13. OHIO REV. CODE §§ 3515.12-.14.

This appeal, not being one which may be taken as a matter of right under sections 2 and 6 of article IV of the Ohio Constitution, can only be filed after leave of the supreme court has been obtained.¹⁴

The third section providing for direct appeal to the supreme court is found in chapter 4123. Section 4123.05 empowers the Industrial Commission to regulate and investigate fees charged claimants by attorneys or representatives and to suspend any person from practice before the Commission or in the Department of Industrial Relations for violation of the rules and regulations promulgated by the Commission. The manner of preferring charges and conducting a hearing is set out in the section:

In case an order is made by the commission to suspend or reprimand such representative, such order may be reviewed on appeal on questions of law in the supreme court, which may affirm or modify such order of the commission or dismiss the complaint. Such appeal shall be filed in the supreme court within forty days after the order of the commission.

This provision comes within the revisory jurisdiction of the supreme court over proceedings of administrative officers as provided in section 2 of article IV of the Ohio Constitution.

Jurisdiction of the Court of Appeals

The jurisdiction of the court of appeals is fixed by article IV, section 6, of the Ohio Constitution. It has original jurisdiction of the five prerogative writs, and appellate jurisdiction, as provided by law, to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers or tribunals, and of courts of record inferior to the court of appeals. Pursuant to this authority, section 5717.04 provides for a direct appeal to the court of appeals from final orders of the Board of Tax Appeals.

For the purpose of clarity, it should be noted that the word "appeal" embraces both law and fact appeals and appeals on questions of law. The first, meaning a retrial of the issues of fact, is in general permitted only in equity cases; the second is an error proceeding which was formerly available by merely filing a petition in error in the reviewing court.

Jurisdiction of the Common Pleas Court

The original and appellate jurisdiction of the court of common pleas, as authorized by article IV, section 4, of the Ohio Constitution is defined by section 2305.01. Except for the exclusive jurisdiction of the county

14. *Bees v. Gilsonan*, 159 Ohio St. 186, 111 N.E.2d 395 (1953); *Young v. Fielder*, 159 Ohio St. 184, 111 N.E.2d 394 (1953); *Foraker v. Perry Township Rural School Dist. Bd. of Educ.*, 130 Ohio St. 243, 199 N.E. 74 (1935).

court as conferred by statute,¹⁵ the common pleas court is a court of general jurisdiction in law and equity, with jurisdiction in many actions not known at common law, such as divorce,¹⁶ will contests,¹⁷ habeas corpus,¹⁸ mandamus,¹⁹ the appropriation of property for public use,²⁰ and other similar actions.

Law and Fact Appeals to the Common Pleas Court

By statute the common pleas court has appellate jurisdiction over the judgments and final orders of all courts of lesser magnitude,²¹ as well as jurisdiction to hear appeals from the final orders of administrative agencies, where provided by law.²² By the provisions of section 2101.42, appeals may be taken to the common pleas court on law and fact from judgments or final orders of the probate court if a record of the evidence introduced on the hearing was not taken in probate court. This section is essential to permit an appeal in a case where the error claimed cannot be demonstrated on the face of the record, that is, where a bill of exceptions is necessary and where a party on the trial of one of the many special proceedings in probate court failed to take a record of the testimony. Many of the hearings in probate court are summary in character. A lawyer, for good reason, may not feel justified in employing a court reporter on every such occasion. Where the events that follow prove that a record should have been taken but in fact was not, the rights of the parties should be protected, and the provisions of section 2101.42 afford at least one way to do it.

Courts have frequently considered that part of section 2101.42 which authorizes a law and fact appeal to the common pleas court from a judgment or final order of the probate court where a record of the proceedings before the probate court has not been taken. The statute was held constitutional in the case of *In re Estate of Bates*,²³ which reversed *Kline v. Kline*.²⁴ Its provisions making a law and fact appeal conditional upon the absence of a record of proceedings in the probate court have now been adequately clarified by judicial construction. A law and fact appeal is not available if a bill of exceptions is unnecessary to present the alleged error to the court of appeals, that is, where the

15. OHIO REV. CODE §§ 1909.04, .08.

16. OHIO REV. CODE § 3105.01.

17. OHIO REV. CODE § 2741.01.

18. OHIO REV. CODE § 2725.02.

19. OHIO REV. CODE § 2731.02.

20. OHIO REV. CODE § 2305.05.

21. OHIO REV. CODE § 2505.24.

22. OHIO REV. CODE §§ 119.11, .12.

23. 142 Ohio St. 622, 53 N.E.2d 787 (1944).

24. 71 Ohio App. 182, 48 N.E.2d 875 (1942).

error can be demonstrated on the face of the record. For example, in *Steward v. Belt*²⁵ the plaintiff filed a demurrer to defendant's answer and cross-petition. The demurrer was sustained and, as the defendant did not desire to plead further, a judgment was entered for the plaintiff. Appeal was taken to the common pleas court under section 2101.42, appellant claiming that no record had been taken of the evidence. The supreme court held that a law and fact appeal was improper under the circumstances:

Where the record of the Probate Court discloses that such court sustained plaintiff's demurrer to the defendant's answer and cross-petition, and, the defendant not desiring to plead further, there is no occasion for a bill of exceptions and section 10501-56, General Code, [Ohio Revised Code section 2101.42] does not authorize any appeal by such defendant to the Common Pleas Court.²⁶

However, when an appeal on law and fact is properly perfected from a judgment of the probate court, a trial de novo is provided, and the common pleas court is then vested with complete jurisdiction to try the issues of fact and enter an order or render judgment, as the case may be.²⁷ When the judgment is entered, the common pleas court has the power to carry such order or judgment into effect, or direct the probate court to do so.²⁸ For example, in the case of *In re Estate of Miller*,²⁹ an appeal on law and fact was taken to the common pleas court from an order of the probate court apportioning the proceeds of a settlement of a wrongful death claim among those entitled by law to share such proceeds. The common pleas court assumed full jurisdiction of the case since no record was made of this aspect of the proceedings in the probate court, and rendered judgment of apportionment, giving all of the proceeds to the widow. The court of appeals reversed the common pleas court because the evidence did not support the judgment, but held that the complete retrial of the issues by the common pleas court was proper.³⁰

Two other circumstances should be mentioned with regard to the appeal on law and fact to the common pleas court under section 2101.42. First, the action in the probate court need not be in chancery. Any judgment or order may be appealed. Second, the appeal is not subject to being dismissed on law and fact and retained on law under the provisions of

25. 152 Ohio St. 399, 89 N.E.2d 572 (1949).

26. *Ibid.*

27. Section 2101.42 of the Code makes the rules of appeal from a common pleas court decision to the court of appeals applicable to appeals from the probate court to the common pleas court under this section. Section 2505.21 provides for a trial de novo on appeal of questions of law and fact.

28. OHIO REV. CODE § 2505.36.

29. 102 Ohio App. 493, 127 N.E.2d 409 (1955).

30. See also *In re Estate of Schneider*, 81 Ohio App. 233, 72 N.E.2d 904 (1947).

section 2505.23. In *Thompson v. Allen*,³¹ the court held that section 2505.23, allowing law and fact appeals to stand as an appeal on questions of law where the action is one which cannot be appealed on law and fact, has no application to an appeal on questions of law and fact from the probate court to the common pleas court.

Courts of Special Jurisdiction

The remaining courts — the probate court, the juvenile court, the municipal court, the mayor's court and the county court — all courts of special or limited jurisdiction³² (the first three being courts of record) are without appellate jurisdiction and will only be considered when spelling out particular or special provisions dealing with appeals specifically applicable to one or more of such courts.

HISTORY OF APPEALS IN OHIO

The first intermediate reviewing court, the circuit court of appeals, came into being by constitutional amendment in 1883.³³ The circuit court's original jurisdiction was the same as that of the supreme court with regard to the extraordinary writs.³⁴ It was also given such appellate jurisdiction as may be provided by law.³⁵ Section 5226 of the Ohio Revised Statutes provided that, in addition to special cases providing for appeal (the word "appeal" then meaning a trial de novo), appeals could be taken to the circuit court from judgments or final orders of the common pleas court in cases where there was no right to a trial by jury. Section 6709 of the Ohio Revised Statutes provided for error proceedings from final orders or judgments of the common pleas court for errors appearing on the face of the record. This right was obtained by filing a petition in error in the reviewing court. Section 6710 of the Ohio Revised Statutes provided for similar error proceedings from the circuit court of appeals to the supreme court. No limitation other than the need to act within the terms of the supreme court's jurisdiction was placed on the right of a litigant to petition for review in that court.³⁶ It should be noted that under the Revised Statutes the word "appeal" meant a retrial of the issues of fact in the reviewing court while an error proceeding meant a review of the record made in the trial court presented to the reviewing court on a petition in error.

31. 72 Ohio L. Abs. 215, 133 N.E.2d 812 (C.P. 1954).

32. OHIO REV. CODE §§ 2151.23; 1901.01, .02; 1901.17, .20; 1907.011, .012, .021, .031.

33. 80 OHIO LAWS 382 (1883).

34. 5226 R.S. (Ohio).

35. *Ibid.*

36. SKEEL'S OHIO APPELLATE LAW § 15 (1958).

The amendments to article IV of the Ohio Constitution of 1912 established the jurisdiction of the supreme court and created and clearly defined the jurisdiction of the court of appeals.³⁷ The right to a retrial of the issues of fact in the court of appeals was restricted to "chancery cases" and provision was made for review upon error.³⁸

Constitutional Amendments Affecting The Nature of An Appeal

A completely new appellate procedure act was passed by the General Assembly of 1935.³⁹ This act, which is now chapter 2505 of the code, completely changed the meaning of the word "appeal." It provided:

(A) 'Appeal' means all proceedings whereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission.

(B) 'Appeal on questions of law' means a review of a cause upon questions of law including the weight and sufficiency of the evidence.

(C) 'Appeal on questions of law and fact' means a rehearing and retrial of a cause upon the law and the facts and is the same as an 'appeal on questions of fact.'⁴⁰

This section was enacted when article IV, section 6, of the Ohio Constitution of 1912, conferred upon the court of appeals original jurisdiction to try any one of the five prerogative writs, "and appellate jurisdiction *in the trial of chancery cases* and to review, affirm, modify or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law."

The 1944 amendment to article IV, section 6, redefined the appellate jurisdiction of the court of appeals as "such jurisdiction as may be provided by law to review, affirm, modify, or set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and courts of record inferior to the court of appeals within the district." Before the amendment of 1944, the power to hear a law and fact appeal was dependent upon the phrase "in the trial of chancery cases." This phrase was completely omitted in the amendment of 1944. It may be argued that the appellate jurisdiction provided by the amendment of 1944 is the power to entertain proceedings in error designated by the appellate procedure act of 1936 as appeals on questions of law, and that the amendment abolishes law and fact appeals. This argument is strengthened by the fact that the power to review final orders and judgments refers to those of administrative tribunals as well as to judgments

37. OHIO CONST. art. IV, § 6 (1912).

38. *Ibid.*

39. 116 OHIO LAWS 104 (1935).

40. OHIO REV. CODE § 2505.01.

of courts of record. This power could not mean the right to a law and fact appeal as to the judgments of administrative agencies; accordingly, no such right is conferred as to appeals from courts of record mentioned with such agencies at the end of this phrase.

The case of *Wagner v. Armstrong*,⁴¹ involved, among other things, the constitutionality of Ohio General Code section 12224, which provided for an appeal (meaning at that time a trial de novo) in all cases invoking the original jurisdiction of the common pleas court where the parties were not entitled by law to a jury trial. The court said:

1. Section 12224, General Code, purporting to vest the courts of appeals with jurisdiction in the trial of cases on appeal, is unconstitutional and void. The jurisdiction of the courts of appeals in the trial of cases on appeal is expressly limited by the constitution to chancery cases, and this jurisdiction cannot be enlarged by the general assembly.
2. All partition cases were originally cognizable in courts of chancery only and must still be regarded as chancery cases and therefore appealable under such terms and procedure as may be provided by law.⁴²

The court cited with approval *Cincinnati Polyclinic Hospital v. Balch*,⁴³ which held that the jurisdiction of the court of appeals was unalterably fixed by article IV, section 6, of the new constitution and the legislature consequently could neither enlarge nor diminish it. This statement that the basis of the jurisdiction of the court of appeals is founded wholly upon and is limited by the provisions of article IV, section 6, of the Ohio Constitution has never been departed from by the supreme court.

In *Hoffman v. Knollman*,⁴⁴ the court dealt with an amendment to section 12223-2, General Code,⁴⁵ which included among the orders from which an appeal could be taken to the court of appeals the order granting a motion for new trial. The supreme court held the statutory amendment unconstitutional in that the legislature had attempted to enlarge the jurisdiction of the court of appeals by making the ruling on a motion for new trial a judgment or final order. The history of the meaning of the words "judgment and final order" is reviewed in this opinion.

After the constitutional amendment of 1944, the legislature amended the definition of a motion for new trial to mean "a reexamination, in the same court, of the issues after a final order, judgment, or decree by the court."⁴⁶ The legislature also amended section 12223-2 of the General Code, again declaring the granting of a motion for new trial (as newly

41. 93 Ohio St. 433, 113 N.E. 397 (1916).

42. *Ibid.*

43. 92 Ohio St. 415, 111 N.E. 159 (1915).

44. 135 Ohio St. 170, 20 N.E.2d 221 (1939).

45. OHIO REV. CODE § 2505.02.

46. OHIO REV. CODE § 2321.17.

defined) to be a final order, basing the power to do so on the amended provision of the Constitution of 1944. In *Green v. Acacia Mutual Life Insurance Company*,⁴⁷ the supreme court held that the amendment to section 12223-2, providing that the granting of a motion for new trial was a final appealable order, was in violation of article IV, section 6 of the constitution. Here again the supreme court adhered to the rule that the jurisdiction of the court of appeals must be found in the words of the constitution.

This background, together with the fact that the constitutional amendment of 1944 struck out the phrase, "and appellate jurisdiction in the trial of chancery cases," and retained only the phrase, "such jurisdiction as may be provided by law to review, affirm, modify, set aside or reverse judgments or final orders of boards, commissions, officers, or tribunals, and courts of record inferior to the court of appeals," gives rise to a serious constitutional question. This latter phrase has traditionally been interpreted to mean an error proceeding which, prior to 1936, was achieved by filing a petition in error in the reviewing court; after that date the proceeding was initiated by filing a notice of appeal on questions of law in the trial court as provided by section 2505.02. The question which arises is whether the court of appeals is now vested with jurisdiction to consider an appeal on questions of law and fact.

Constitutionality of Law and Fact Appeals

In analyzing this question, consideration must be given to the case of *Youngstown Municipal Railway v. Youngstown*.⁴⁸ This was an action seeking to enjoin the City of Youngstown from assessing an annual license tax imposed on trackless trolleys operated in the city. The trial court held the tax valid and the railway appealed on law and fact. This was clearly a chancery case. The cause of action accrued and the proceeding commenced after the effective date of the constitutional amendment of 1944. A motion was filed to dismiss the appeal on law and fact on the grounds that the court of appeals was without jurisdiction, by virtue of the constitutional amendment, to hear such an appeal. The court of appeals granted the motion, but the supreme court reversed upon the following reasoning:

1. Section 6 of article IV of the Constitution of Ohio, as amended November 7, 1944, empowers but does not require the General Assembly to change the appellate jurisdiction of the court of appeals.
2. Unless and until there is such legislative action, the appellate jurisdiction of the Court of Appeals remains as it was at the time the amendment was adopted.⁴⁹

47. 156 Ohio St. 1, 100 N.E.2d 211 (1951).

48. 147 Ohio St. 221, 70 N.E.2d 649 (1946).

49. *Id.* at 221, 70 N.E.2d at 650.

It must be noted that this case does not hold that the court of appeals has retained jurisdiction of law and fact appeals under the terms of article IV, section 6, as amended. The opinion sets out with emphasis that a part of the amendment provides: "all laws now in force not inconsistent herewith shall continue in force until amended or repealed"⁵⁰

The *Youngstown* case must not be interpreted as holding that the 1944 amendment to article IV, section 6, vested the court of appeals with jurisdiction of appeals on law and fact. If the court had come to that conclusion, it would have been based squarely on the new provision of article IV, and there would have been no reason or necessity to depend upon that provision which expressly retained statutes on appeal in force prior to the amendment.

Defendant-appellee contended in the *Youngstown* case "that the effect of this amendment is to abolish completely the jurisdiction of the court of appeals except as to the enumerated original actions and that those courts will have no appellate jurisdiction unless and until provision therefor is made by legislative enactment by the General Assembly."⁵¹ That contention went far beyond the issues of the case. The real question concerned the power of the court of appeals to entertain a law and fact appeal under the amended constitution. There could be no doubt that the jurisdiction of the court of appeals to hear appeals on questions of law was clearly retained by the amendment of 1944 and that the provisions of chapter 2505, implementing appeals on questions of law, were in complete accord with that amendment. Only the provisions of this chapter concerning law and fact appeals found no support and were in conflict with the provisions of the amendment. The possibility that the court of appeals would be without appellate jurisdiction, unless the judgment of the court of appeals dismissing the appeal on law and fact and retaining it on questions of law was reversed, was not the question before the court. The sole question was the retention of jurisdiction in law and fact cases by the court of appeals.

In any event, since this decision the legislature has dealt with the jurisdiction of the court of appeals. Section 2501.02 was amended, effective October 4, 1955, to provide:

In addition to the original jurisdiction conferred by Section 6 of Article IV, Ohio Constitution, the court [of appeals] shall have jurisdiction: Upon an appeal on questions of law to review, affirm, modify, set aside or reverse judgments or final orders of courts of record inferior to the court of appeals within the district, including the finding, order or judgment of a juvenile court that a child is delinquent, neglected or dependent, for prejudicial error committed by such lower court.

The section then quotes the only part of the amendment to article IV,

50. 147 Ohio St. 221, 223, 70 N.E.2d 649, 650 (1946), citing OHIO CONST. art. IV, § 6.

51. 147 Ohio St. 221, 223, 70 N.E.2d 649, 651 (1946).

section 6 which confers appellate jurisdiction on the court of appeals and adds:

Upon an appeal on questions of law and fact the court of appeals, in cases arising in courts of record inferior to the court of appeals within the district, shall weigh the evidence and render such judgment or decree as the trial court could and should have rendered upon the original trial of the case, in the following classes of actions, seeking as a primary and paramount relief: [then follow the names of ten classes of actions sounding in equity].

In all cases not falling within the classes designated above, the court of appeals shall have jurisdiction to proceed as an appeal on questions of law only.

Unless it can be said that the power to retry the facts on appeal in the court of appeals can be found in the constitutional provision, "such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards . . . and courts of record inferior to the court of appeals within the district,"⁵² the power or jurisdiction of the court of appeals to hear appeals on questions of law and fact was not included in the amendment. In fact, that power was clearly abolished by removing the phrase "jurisdiction in the trial of chancery cases." The case law above cited and the amended provisions of the constitution justify such conclusions. Only a review by the supreme court can settle the question.⁵³

LAW AND FACT APPEALS

Limitations on Law and Fact Appeals

If this question is settled by holding that the court of appeals is vested with jurisdiction to try appeals on law and fact, then two other rules must be considered to determine whether an appeal on questions of law and fact is permissible in a particular case. The first question is whether the original pleadings pray for primary relief "in chancery" as defined in section 2501.02. The mere fact that some equitable relief is prayed for does not settle the question. If the action is for a money judgment, the fact that ancillary relief in equity is prayed for does not permit a law and fact appeal. On the other hand, in *Supply Company v. Garchev*,⁵⁴ the supreme court held that, where a petition discloses allegations setting forth the existence of a continuing nuisance and a prayer for a perpetual injunction, the fact that it contains a prayer for a money judg-

52. OHIO CONST. art. IV, § 6.

53. See Ross, *Some Comments on Changes in Ohio Procedure*, 31 Ohio Op. 358 (1945) (supporting the view that the court of appeals retains law and fact jurisdiction); Gardner, *What did the 1944 Amendment to the Constitution Do to the Jurisdiction of the Court of Appeals?* 31 Ohio Op. 561 (1945) (expressing the contrary position).

54. 123 Ohio St. 316, 175 N.E. 456 (1931).

ment does not preclude the right to an appeal on questions of law and fact. A defendant cannot, by pleading equitable defenses without seeking affirmative relief to an action at law, become entitled to a law and fact appeal;⁵⁵ but if affirmative relief in equity is set up in the answer, an appeal on law and fact is available to the defendant.⁵⁶

The second point to be kept in mind is that there must have been a trial on the factual issues in the trial court and not a judgment entered upon motion after the plaintiff's case has been presented as a matter of law, or the defendant's defense for like reasons, or upon sustaining a de-

55. *Ibid.*

56. In a recent article dealing with the jurisdiction of the court of appeals, the conclusion is reached that the court's jurisdiction is now subject to legislative control. O'Connell, *The Jurisdiction of the Ohio Courts of Appeals and the Background Thereof*, 14 Ohio Op. 2d 352 (1961). The author's contention is briefly stated: "It is true that the 1944 amendment [to article IV, section 6] had given the Legislature complete power over the appellate jurisdiction of the court. The Legislature could even abolish the appellate jurisdiction of the court of appeals and could really abolish the court itself." *Id.* at 371.

To ascribe to the phrase, "such jurisdiction as may be provided by law to review, affirm, modify or set aside or reverse judgments . . .," a meaning so completely different from that ascribed to it by the supreme court over the years, beginning with the case of *Cincinnati Polyclinic v. Balch*, 92 Ohio St. 415, 11 N.E. 159 (1915), is not justified. The author's contention is based on the fact that the clause, "as may be provided by law," is put at the beginning of the phrase instead of at the end, as it was in the Constitution of 1912, which was worded as follows: ". . . and appellate jurisdiction in the trial of chancery cases and to review, affirm, modify or reverse the judgments of the courts of common pleas, superior courts, and other courts of record within the district *as may be provided by law . . .*" (Emphasis added.) In the *Balch* case the court held that the power of the legislature over the jurisdiction of the court of appeals granted by the phrase, "as may be provided by law," was authority "to provide the method for perfecting an appeal and the procedure in error cases, but it has no power to enlarge or limit the appellate jurisdiction of courts of appeals." 92 Ohio St. 415, 417, 11 N.E. 159, 161 (1915). This has been the meaning ascribed to this phrase by the supreme court since this decision. It must therefore be held that the people in voting to amend the Ohio Constitution, with that phrase retained, intended to retain the historic meaning of the phrase, "as may be provided by law," in the amendment. As was held in *Green v. Acacia Mutual Life Insurance Co.*, 156 Ohio 1, 100 N.E.2d 211 (1951), "[W]hen the constitutional amendment providing for an appellate review by the Court of Appeals only as to judgments and final orders was adopted in 1944, the people in voting upon the amendment must have attributed to judgments and final orders the meaning which this court had declared and which obtained at the time of the submission of the amendment, and at that time, assuredly the granting of a motion for a new trial where there was no abuse of discretion by the trial court in granting it, was not a judgment or final order, even though the General Assembly had attempted to make it so." *Id.* at 9, 100 N.E.2d at 215.

The court in the *Green* case reasoned that while the legislature may deal with the manner in which the court of appeals exercises its jurisdiction "as may be provided by law" to review, affirm, modify, set aside or reverse judgments or final orders of boards, commissions, tribunals and of courts of record inferior to the court of appeals within the district, the constitutional power to act as a reviewing court thus conferred by the Ohio Constitution cannot be enlarged or taken away by the legislature.

The suggestion that the legislature could completely wipe out the jurisdiction of the court of appeals would be to ascribe to the amendment of 1944 the power not only to end the jurisdiction of the court of appeals as a reviewing court but in doing so to make ineffective the greater part of the jurisdiction of the supreme court where its jurisdiction in large measure is the review of the judgments of the court of appeals.

The people of Ohio incorporated the jurisdiction of its appellate courts in the Ohio Constitution in 1912 and there is no indication that so radical a change as is suggested by the article above cited was intended by the amendment in the light of the supreme court decisions since the adoption of such amendment.

murrer followed by entering judgment, the losing party not desiring to plead further. In such situations the party against whom judgment is thus entered, even in a chancery case, can appeal only on questions of law.⁵⁷

Procedure for a Law and Fact Appeal

If it be concluded that the right to an appeal on questions of law and fact exists, the steps to be taken must be set out. The only step necessary to confer jurisdiction on the court to which the appeal is taken is the notice of appeal, which is filed in the trial court.⁵⁸ The provision that a copy must be filed in the reviewing court can have no application in an appeal on questions of law and fact because there are no provisions permitting or requiring leave to appeal in a chancery case to the court of appeals. The appeal is commenced by filing a notice of appeal in the trial court, either within twenty days after the judgment or decree has been approved by the court in writing and filed with the clerk for journalization, or after the overruling of a motion for new trial.⁵⁹ Otherwise, the right to appeal is lost.⁶⁰

The notice of appeal must describe the judgment, decree or order appealed from, and it must state that the appeal is on questions of law and fact.⁶¹ An appeal bond superseding the judgment or decree is necessary⁶² and the bond must be filed within the time for filing the notice of appeal.⁶³ The bond is to be not less than the amount of the judgment plus interest, as directed by the trial court or the court to which the appeal is taken, and the sureties must be approved by the trial court or the clerk.⁶⁴ The bond is to be payable to the adverse party or as directed by the court when the conflicting interest of the parties requires it, on condition that the appellant will abide the order or judgment of the court.⁶⁵ The failure to file a supersedeas bond within the time for filing a notice of appeal requires the court to dismiss the appeal on law and fact,⁶⁶ but such an appeal may be retained as an appeal on questions of law;⁶⁷ and if a bill of exceptions has not been filed for an appeal on questions of law,

57. *Le Maestre v. Clark*, 142 Ohio St. 1, 50 N.E.2d 331 (1943).

58. OHIO REV. CODE § 2505.04.

59. *Ibid.* Where a motion for new trial is filed, the notice of appeal cannot be filed until such motion is ruled upon by the court. OHIO REV. CODE § 2505.07.

60. OHIO REV. CODE § 2505.07.

61. OHIO REV. CODE § 2505.05.

62. OHIO REV. CODE § 2505.06. The three exceptions to this requirement are found in OHIO REV. CODE § 2505.12.

63. OHIO REV. CODE § 2505.06.

64. OHIO REV. CODE §§ 2505.09, .10.

65. OHIO REV. CODE § 2505.14.

66. OHIO REV. CODE § 2505.06.

67. OHIO REV. CODE § 2505.23.

the court may allow time, not to exceed thirty days from the dismissal of the law and fact appeal, for the bill to be filed.⁶⁸ This same procedure is followed as to a bill of exceptions where the court determines that an appeal on law and fact is not available to the appellant under the facts shown by the record but where the court retains the appeal on questions of law.⁶⁹

Preparation for a law and fact appeal requires that certain steps be taken in the trial court. First, it is necessary to make certain that the order appealed from is a final order.⁷⁰ Second, if desired, a motion for new trial may be filed which, under amended section 2321.17, "is a re-examination, in the same court, of the issues after a final order, judgment, or decree by the court." The filing of a motion for a new trial is optional.⁷¹ If a motion for new trial is filed, a notice of appeal must not be filed until such motion has been ruled on,⁷² and the time for filing the notice of appeal, where a motion for a new trial has been timely and properly filed, dates from the overruling of such motion.⁷³ The circumstances under which a motion for a new trial is not proper and does not toll the time for filing a notice of appeal will be considered when taking up appeals on questions of law. A third step to be taken, within ten days of the notice of appeal, is the filing of a precept for the transcript in the trial court and payment therefor.⁷⁴ The clerk of the trial court will thereupon file in the reviewing court a transcript of the docket and the original papers.

The first step to be taken in the court of appeals should be to arrange for the presentation of the evidence. Section 2505.21 provides that the

court shall review the final order, judgment or decree upon such part of the record made in the trial court as any party may present to the court and such additional evidence as upon application in the interest of justice the court may authorize to be taken, such evidence to be presented in the manner and form prescribed by the court.

It was the purpose of this section to require the parties to present in the trial court all the evidence available or known to them at the time of the first trial so that the case which is presented in the court of appeals involves the same facts tried in the court of original jurisdiction. A court of appeals should restrict additional evidence to that which was not available or known to the party at the time of the first trial and

68. OHIO REV. CODE § 2321.05.

69. OHIO REV. CODE §§ 2505.23, 2321.05.

70. OHIO REV. CODE §§ 2505.02, .03.

71. OHIO REV. CODE § 2321.01.

72. OHIO REV. CODE § 2505.07.

73. *Ibid.*

74. OHIO REV. CODE § 2505.08.

which, in the interest of justice, should be presented to supplement the transcript taken in the trial court.

The filing of briefs, first by the plaintiff and then by the defendant (no matter who may be the appellant or the appellee) and the presentation of oral arguments follow as a matter of course. The appeal on law and fact is restricted because of the fact that only the probate court, the common pleas court and, in a limited way, the municipal court are vested with jurisdiction in equity. Only judgments of such courts in actions coming within the cases defined by section 2501.02 can be the subject of an appeal on questions of law and fact.

There are two other provisions in the Code for law and fact appeals. Chapter 1921 permits an appeal (using the word in the meaning ascribed to it prior to 1936) to a common pleas court from the judgment of the county court by giving bond as provided by section 1921.03. Bond must be filed within ten days of the judgment, a transcript must be filed in the common pleas court within thirty days of judgment, and all necessary pleadings must be entered; thereafter, the cause is retried, just as if it had been originally filed in the common pleas court. Such appeals are, of course, in a law case since county courts have no equity jurisdiction.

A law and fact appeal is also provided by section 143.27 from an order of the Civil Service Commission of a city in cases of suspension, demotion or removal of a police or fire officer from the service. Such appeal is to the common pleas court of the county in which the city is located. Section 143.27 was amended to provide for a law and fact appeal from an order of removal or disciplinary action of the Civil Service Commission after the supreme court held that former section 143.27 did not permit a law and fact appeal.⁷⁵

APPEALS ON QUESTIONS OF LAW

Appeals from Administrative Agencies

Appeals on questions of law cover by far the greater part of the field of appellate procedure. In considering this part of the subject, it is appropriate to consider appeals from administrative agencies first. Chapter 119 of the Code, "Administrative Procedure," deals exclusively with state agencies. It provides for the adoption, amendment and rescission of rules and for appeals to the Common Pleas Court of Franklin County by those adversely affected by the agencies' exercise of their rule making power, and for appeals to the common pleas court from orders of state agencies pursuant to an adjudication denying an applicant admission to an examination or denying an issuance or renewal of a license, registration of a licensee or revoking or suspending a license. Where the agency's author-

75. *Sorge v. Sutton*, 159 Ohio St. 574, 113 N.E.2d 10 (1953).

izing statute creates the right to appeal and establishes the procedure to be followed in appeals to the courts from its orders such procedure must be followed.⁷⁶ There are a number of procedural steps provided within the chapters of the Code creating each of the agencies — steps which must be followed in detail to allow one seeking an appeal to avail himself of that right.⁷⁷

Since chapter 119 deals exclusively with state agencies, appeals to the courts from adjudications of local administrative agencies must be guided by the provisions of chapters 2505 and 2506. Section 2505.03 provides that:

... When provided by law, the final order of any administrative officer, tribunal, or commission may be reviewed as provided in sections 2505.04 to 2505.45, inclusive of the Revised Code unless otherwise provided by law

Section 2506.01 provides:

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court ... as provided by sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by section 2506.01 to 2506.04, inclusive, of the Revised Code.

In the authorizing statutes of some local agencies the right to appeal is granted in the act creating and defining the powers of the agency, although there are other agencies for which no provisions are made relating to appellate procedure.⁷⁸

So it is that chapter 2506, providing the procedure on appeal from final orders of administrative agencies to the common pleas court, is supplemental to the other procedural steps required on appeal as provided by law, including chapter 2505.⁷⁹ The importance of chapter 2506 is that it provides for the procedure to be followed after filing notice of appeal whereas chapter 2505, although it provides for appeals from administrative tribunals,⁸⁰ does not provide adequate procedures on such appeals.⁸¹ For example, section 2505.08, the only section in the chapter dealing with the filing of the transcript and the original papers in the reviewing court, can have application only in appeals from final orders or judgments of judicial tribunals. On the other hand, section 2506.02

76. OHIO REV. CODE § 2505.03.

77. The step by step procedure is set out in SKEEL'S, OHIO APPELLATE LAW (1958) and the 1959 supplement where amendments to the act have been noted.

78. *E.g.*, OHIO REV. CODE §§ 303.15, 307.56 (County Rural Zoning); OHIO REV. CODE §§ 6101.35, 6101.40 (County Commissioners Conservancy District); OHIO REV. CODE ch. 5563 (County Roads).

79. OHIO REV. CODE § 2506.01.

80. OHIO REV. CODE § 2505.03.

81. OHIO REV. CODE § 2505.07.

requires the agency from which an appeal is taken to file, within thirty days of the filing of the notice of appeal, a complete transcript of all the original papers, testimony and evidence offered or heard and taken into consideration in entering the order appealed from. This provision, under some circumstances, presents an almost impossible task for the agency. It is the exception and not the rule that the testimony of witnesses before local administrative agencies is preserved by reporters' shorthand notes. There is no provision (except as to some state agencies) requiring the reporting of the testimony offered.

Section 2506.03 does, however, suggest a remedy for relieving local agencies of the burden of making a complete transcript of evidence in the event of appeal by the aggrieved party. This section specifies the circumstances in which additional evidence to be considered on appeal may be taken to supplement that, if any, contained in the transcript. It provides that the trial shall be, as in civil actions, confined to the transcript, unless one of the following situations appears on the face of the record or by the affidavit of the appellant:

- A. The transcript does not contain all the evidence admitted or proffered.
- B. The appellant was not permitted to be heard in person or by his attorney in opposition to the order.
- C. The testimony presented to the agency was not under oath.
- D. Appellant could not present evidence because of the agency's lack of power of subpoena or the agency's refusal to exercise its power to subpoena when it possesses such power.
- E. The agency failed to file conclusions of fact supporting the order with the transcript.

In any case, the appeal is to be heard on the transcript and such additional evidence as may be introduced by any party under any of the circumstances set out in the statute. The privilege of calling opposing witnesses for cross-examination is also provided.⁸²

This provision of the chapter was clearly intended to permit the transcript to be supplemented only when necessary to create a proper record upon which an appeal may be heard. A trial de novo is not provided. The judgment or order which the court is authorized to enter is limited by section 2506.04 to one which is usually entered in an appeal on questions of law. The entry deals with orders of an agency and not with judgments which are independent of agency orders. The court is authorized to review the decision of the agency upon the record to determine whether the judgment or order is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of

82. OHIO REV. CODE § 2506.03 (E).

the credible evidence in the record.⁸³ Consistent with such finding, the court may affirm, reverse, vacate or modify an order, adjudication or decision of the agency, or remand the cause to the agency and require it to enter an order consistent with the finding and opinion of the court.⁸⁴

It should be noted that the jurisdiction of the court is circumscribed in such appeals by the provisions of chapters 2505 and 2506. Chapter 2505 provides for two appeals, one on questions of law and one on questions of law and fact. Law and fact appeals, if still available, are limited by section 2501.02 to a retrial of the named chancery cases. Therefore, without a provision such as is found in section 143.27, providing for a law and fact appeal for a police officer who is removed from office or disciplined by the Civil Service Commission, the appeal from final orders of administrative agencies, based on the authority of chapter 2506 must be an appeal on questions of law.⁸⁵

Appeals From Lower Courts

Appeals on questions of law from judgments, decrees, or final orders of courts are controlled by the provisions of chapters 2505 and 2953 of the Code together with provisions relating to motions for new trial and the filing of bills of exception. It is clear that the time within which an appeal can be taken begins to run from the date the judgment or final order is entered in the trial court.⁸⁶ Such date may be extended by the filing of a motion for new trial or a motion for judgment *non obstante veredicto* where the case was tried to a jury.⁸⁷ The time for appeal from the final order, judgment, or decree runs from the date that the journal entry is approved in writing by the court and filed with the clerk for journalization.⁸⁸ This rule applies to all courts of record. The entry on the appearance docket would suffice in a court not of record.⁸⁹

Motion for New Trial as Affecting Time for Filing Notice of Appeal

The time for filing a notice of appeal from a final order of a court will not in every case be extended by the filing of a motion for new

83. OHIO REV. CODE § 2506.03.

84. *Ibid.* In an appeal to the court of appeals from a judgment of the common pleas court reviewing the order of an administrative agency, the manner of making a part of the record any additional evidence received in the common pleas court under section 2506.03 is now provided for by section 2321.05, amended effective August 17, 1961. Such new evidence can be presented as a bill of exceptions within forty days of the notice of appeal and certified along with the transcript from the agency hearing.

85. *Fleischman v. Medina Supply Co.*, 111 Ohio App. 449 (1960).

86. OHIO REV. CODE § 2505.07.

87. *Ibid.*

88. *Ibid.*

89. All the trial courts in Ohio are provided with a clerk except the mayor's court. The mayor's court is without jurisdiction in civil cases, its jurisdiction being limited to certain criminal cases. OHIO REV. CODE § 1905.19.

trial or, as is sometimes done, the filing of what is called a motion for "reconsideration." There is no provision in judicial procedure for a pleading called a motion for "reconsideration." Section 2505.07 provides:

After the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk for journalization, or after the entry of other matter for review, the period of time within which the appeal shall be perfected, unless otherwise provided by law is as follows:

(A) Appeals to the supreme court or to the court of appeals or from municipal courts, and from probate courts to courts of common pleas, shall be perfected within twenty days.

When a motion for new trial or a motion for judgment under section 2323.18 of the Revised Code [motion for judgment notwithstanding the verdict] is filed by either party within the time provided by sections 2321.19 and 2323.181 of the Revised Code, respectively, then the time of perfecting the appeal shall not begin to run, and an appeal shall not be taken, until the entry of the order overruling or sustaining the motion for judgment under section 2323.18 of the Revised Code, or the motion for a new trial, if only one of such motions shall have been filed, or overruling or sustaining the last of such motions decided, if motions of both kinds shall have been filed.

(B) All other appeals shall be perfected within ten days.

There is no such thing as a motion for new trial in an administrative hearing, just as there is no provision for filing a request for a rehearing of a motion for new trial. Such a request would not toll the time for filing an appeal unless the court vacated the entry overruling the motion for new trial on proper grounds.⁹⁰ As to judicial proceedings, the function of the motion for new trial provided by section 2321.17 is to re-examine the issues in the same court after a final order or judgment. Under such circumstances, either after trial of the issues in the original case, or, where subsequent to the original judgment (upon motion) new issues of law and fact are properly presented in a special proceeding on matters separate and apart from the issues tried originally, a motion seeking a new trial of such order will toll the time for giving notice of appeal from such order. In the case of *Mullineaux v. Garry*,⁹¹ it was held:

In a hearing upon motion to distribute appeal bond money, the appeal having been dismissed, one of the issues is the extent of appellee's damage because of the appeal not being properly brought, a factual question, the determination of which is subject to re-examination upon a motion for a new trial.⁹²

But where the proceeding is one seeking the vacation of a judgment after term, which in reality is a request (either by motion or petition)

90. *Tims v. Holland Furnace Co.*, 152 Ohio St. 469, 90 N.E.2d 376 (1950).

91. 79 Ohio L. Abs. 31, 154 N.E.2d 96 (1956).

92. *Ibid.*

for a new trial, a motion for rehearing or new trial after decision on the motion to vacate is not provided for and, if filed, does not toll the time for appeal. In the case of *Gynn v. Gynn*,⁹³ a petition to vacate a judgment after term under the provisions of section 2325.01 was filed July 1, 1955 (three years after the decree for divorce was journalized). Upon trial the court denied the relief prayed for on May 11, 1957. A motion for new trial was filed May 21, 1957, and overruled on July 26, 1957, and the notice of appeal on questions of law was filed on August 14, 1957, nineteen days after the overruling of the motion for new trial, directed to the final order of May 11, 1957, denying defendant's petition to vacate. The court held that the final order was the overruling of defendant's petition to vacate the previous judgment after term, which petition was in reality a motion for new trial, and that a request for a rehearing of such "petition" did not toll the time for filing an appeal. The motion for new trial only provided for the re-examination of the issues in a proceeding after trial and judgment or final order in the first instance.

Similarly, a motion for a rehearing following an adverse decision on appeal to the common pleas court should not toll the time for filing notice of further appeal. In *State v. Baldasarro*,⁹⁴ the defendant was found guilty of a misdemeanor in the Municipal Court of Columbus. An appeal was taken to the Common Pleas Court of Franklin County where on May 21, 1957, the judgment of the municipal court was affirmed and a special mandate sent to the trial court to carry the judgment into effect. The defendant on the same day filed an application for rehearing. On July 5, 1957, by entry in the common pleas court the application for rehearing (claimed by the appellant to be a motion for new trial) was denied. Notice of appeal to the court of appeals was filed in the common pleas court on September 3, 1957, claiming the order denying the motion for rehearing as the final order. The court of appeals held that the final order in the proceeding on appeal in the common pleas court was May 21 and that a motion for rehearing of the entry in the common pleas court did not toll the time for filing a notice of appeal to the court of appeals.⁹⁵

The case of *In re Appeal from the Board of Liquor Control*,⁹⁶ must be considered in dealing with this question. An appeal was taken from the board of the Common Pleas Court of Franklin County. On August 8, 1955, after refusing a request to permit the introduction of further evi-

93. 106 Ohio App. 132, 148 N.E.2d 78 (1958).

94. 104 Ohio App. 530, 150 N.E.2d 462 (1957).

95. *Accord*, *Federal Tel. & Radio Corp. v. Wysong*, 94 Ohio App. 557, 116 N.E.2d 606 (1953).

96. 103 Ohio App. 517, 146 N.E.2d 309 (1957).

dence, the court found that the procedural requirements in adopting, amending and repealing the challenged regulation had been complied with and that the regulation so adopted was reasonable and lawful. On August 9, appellant filed a motion for new trial. Upon motion of the appellee, the motion for new trial was stricken from the file on October 4, 1956, on the ground that there is no provision for the filing of such a motion in the common pleas court when such court has exercised its appellate jurisdiction under section 119.11. On the same day a notice of appeal was filed on questions of law from judgments entered on August 8 and October 4, 1956. The court of appeals reversed the order striking the motion for new trial and remanded with instructions that the common pleas court hear the merits of the motion.

The decision by the court of appeals in this case was incorrect on two accounts. First, the court of appeals attempted to distinguish the case before it from *Kromer v. Kear*⁹⁷ when no such distinction could be made. The *Kromer* case clearly and correctly held that the common pleas court, in the exercise of its appellate jurisdiction, can not entertain a motion for new trial directed to a judgment of reversal entered on an appeal on questions of law from a court of lesser magnitude. That case held further that the filing of such motion for new trial does not toll the time for filing a notice of appeal from such judgment to the court of appeals. The court of appeals in the *Board of Liquor Control* case also erred in equating a motion for new trial following a decision on appeal from an administrative agency with a motion for new trial following a judgment rendered by a court of first instance. The fact that a motion for a new trial is now defined as a re-examination in the same court of the issues after judgment does not suggest that such definition applies to an appellate court in an appeal on questions of law. In such proceeding the reviewing court does not try the issues either of law or fact. It reviews the proper application of the law to the facts or limits its review to other assignments of error. It does not engage in "re-examination of issues of law"⁹⁸ in the same way as would be done on a motion for a new trial in the trial court.

In *Farrand v. State Medical Board*,⁹⁹ the court held that an "appeal," as that word is used in section 119.12 relating to appeals to the common pleas court, is a proceeding whereby the court reviews the action or decision of the agency and affirms, reverses, vacates or modifies such order; the court may not substitute its judgment for that of the agency, but is confined to determining the rights of the parties in accordance with the statutes and other applicable law. Such a proceeding is a review and not

97. 86 Ohio App. 309, 90 N.E.2d 422 (1949).

98. *Id.* at 310, 90 N.E.2d at 423.

99. 151 Ohio St. 222, 85 N.E.2d 113 (1959).

a trial and the filing of a motion for a new trial in such a proceeding does not toll the time for filing a notice of appeal under section 2505.07.

The time for filing a motion for new trial in the common pleas court in a civil action is ten days from the filing of the judgment with the clerk for journalization after it has been approved in writing by the court;¹⁰⁰ the court has the right to extend the time in some cases hereafter considered. The same time is provided for filing a motion *non obstante veredicto* as set out in section 2323.181. These sections apply to procedure in municipal courts as well.¹⁰¹ The only section dealing with a motion for new trial in a case in the county court in a civil action is section 1913.25. It provides that within four days from judgment on the motion, a new trial may be granted, if the court is satisfied that the verdict was obtained by fraud, partiality or undue means.¹⁰² This certainly applies only to a jury trial. There is no provision for a motion for a new trial when the trial is to the court. The uncertainty of the rule of section 1913.25 would dictate that if an appeal is to be taken in a civil case from a judgment of the county court, the notice of appeal should be filed within ten days of the entry of judgment.

Requirement of a Bill of Exceptions

The requirement of a bill of exceptions, the time for its filing and the manner in which it shall be settled are set out in section 2321.05. Where the error claimed cannot be demonstrated on the face of the record, a bill of exceptions is absolutely necessary to put into the record such evidence and other matters as must be shown on appeal — matters which are not considered a part of the record when it is originally filed or presented in the case. A court is absolutely powerless to extend the time for filing a bill of exceptions or to add something to it that is not of record. The following materials are matters of record: pleadings, affidavits required by law as prerequisites for filing pleadings or obtaining service, stipulations of fact filed with the papers in the case by authority granted by the court and exemplified by a journal entry of the court, and all journal entries and conclusions of fact and law filed by the court and journalized with the papers in the case after the granting of a motion under section 2315.22 (finding of fact and law when the case is tried to the court). Affidavits filed in support of motions for new trial are not a part of the record and the bill of exceptions must include them if they are to be considered on appeal.

100. OHIO REV. CODE § 2321.19.

101. OHIO REV. CODE § 1901.21.

102. The legislature is now considering an amendment to § 1913.25 which would allow the judge of a county court to grant a motion for a new trial on the same grounds on which such motion can be granted in the common pleas court under § 2321.17. See S.B. 367, 104th General Assembly, 1961-62.

The following cases exemplify the point. In *Liebbrand v. Butler*,¹⁰³ the court said in the second paragraph of the syllabus:

Where a motion for new trial is predicated on the ground of newly discovered evidence which is presented to the court in affidavit form, the substance of which is contained in the journal entry sustaining the motion, and appeal is taken from such order, the claimed error of the sustaining of such motion appears on the fact of the record and the affidavit need not be incorporated in a bill of exceptions.¹⁰⁴

Here the court journalized the facts relied on in granting a new trial. The same question was considered in *Celina Mutual Casualty Company v. Fraley*,¹⁰⁵ but a different result was reached on a different set of facts. In that case the court said that affidavits filed in support of a motion for a new trial on the ground of newly discovered evidence must be made part of the bill of exceptions. The facts relied on in support of the motion were not journalized.

In *Goyert & Vogel v. Eicher*,¹⁰⁶ the court stated:

An agreed statement of facts, although in writing signed by counsel of all parties and filed, does not become a part of the record unless brought upon the record by a bill of exceptions, or the facts as agreed upon are stated in the journal entry as the court's finding of facts.¹⁰⁷

In *Willett v. New York Central Railroad Company*,¹⁰⁸ the court said in the syllabus:

Affidavits, filed with the clerk in support of a motion for a new trial on the ground of misconduct of jurors, as authorized by Section 11579, General Code, are not a part of the record and cannot be considered on appeal in the absence of a bill of exceptions incorporating them. Whether affidavits filed with the clerk are a part of the record depends upon the purpose for which they are filed as authorized by law.

Under the statutes of Ohio authorizing the use of affidavits as a method of proving an issue of fact under certain circumstances, the affidavits are not part of the record, even though filed with the clerk.¹⁰⁹

In the course of the opinion, the court stated further:

It seems clear that the mere filing of certain affidavits with the clerk makes them a part of the record for the intended purpose. Other affidavits, though filed, are not a part of the record, unless made so by a bill of exceptions.¹¹⁰

103. 88 Ohio App. 185, 97 N.E.2d 80 (1950).

104. *Ibid.*

105. 78 Ohio L. Abs. 191, 151 N.E.2d 759 (Ct. App. 1957).

106. 70 Ohio St. 30, 70 N.E. 508 (1904).

107. *Ibid.*

108. 73 Ohio App. 59, 54 N.E.2d 317 (1943).

109. *Ibid.*

110. *Id.* at 60, 54 N.E.2d at 318.

Other cases have further clarified this matter.¹¹¹ In *Bailey v. Progressive Motor Sales*,¹¹² the court held that in order to be considered on appeal, an affidavit must be incorporated in the bill of exceptions, unless it is one which is specifically required as a basis for judicial action.¹¹³

When there is any doubt about the need for a bill of exceptions or whether papers used in the trial are or are not a part of the record, a bill of exceptions should be filed authenticating their use as evidence.

ORDER OF PROCEDURE FOR TAKING AN APPEAL

Steps to be Taken in Civil Cases

It is now appropriate to set out in chronological order the procedure which may or must be carried out in the trial court to prepare for an appeal in civil cases.

The first step is to make a motion for new trial. This step is optional.¹¹⁴ It is provided that the motion for new trial (which is a re-examination of the issues after trial and judgment or entry of a final order) be presented in writing, based on one or more of the grounds set out in section 2321.17 and filed with the clerk of the trial court within ten days of the journal entry after written approval of the court has been given and filed with the clerk of the trial court for journalization.¹¹⁵ If a party is unavoidably prevented from filing an application for a new trial within such time, the court may in the interest of justice extend such time.¹¹⁶

Second, the party must file a notice of appeal which is the only jurisdictional step in perfecting an appeal. The notice of appeal must be filed within twenty days of the filing of the journal entry, setting out the judgment or final order, or within twenty days from the overruling of a motion for new trial or a motion *non obstante veredicto*. If both motions are filed, notice of appeal must be filed within twenty days of the ruling on the later motion.¹¹⁷ A motion *non obstante veredicto* can only be filed where the issues of fact are tried to a jury. A notice of appeal will not

111. *Id.* at 62, 54 N.E.2d at 319; see also, *Bailey v. Progressive Motor Sales*, 101 Ohio App. 173, 138 N.E.2d 433 (1955); *Mounts v. Eclipse Motor Lines*, 88 Ohio App. 211, 91 N.E.2d 530 (1949); *State v. Grambo*, 82 Ohio App. 473, 75 N.E.2d 826 (1947); *Coldren v. May*, 72 Ohio App. 484, 52 N.E.2d 528 (1942); *Schultz v. Stah*, 32 Ohio St. 276 (1877); *Goldsmith v. State*, 30 Ohio St. 208 (1876); *Gaines v. White*, 23 Ohio St. 192 (1872); *Sleet v. Williams*, 21 Ohio St. 82 (1871).

112. 101 Ohio App. 173, 130 N.E.2d 433 (1955).

113. *Id.* at 174, 138 N.E.2d at 434.

114. OHIO REV. CODE §§ 2321.17, .20.

115. *Ibid.* (except in case of newly discovered evidence); see OHIO REV. CODE § 2321.17 (G).

116. OHIO REV. CODE § 2321.19.

117. OHIO REV. CODE § 2505.07.

be effective, if filed, while any motions are pending.¹¹⁸ The twenty day rule applies to an appeal in a civil case from the municipal court as well as from the common pleas court.¹¹⁹ All other notices of appeal from trial courts inferior to the common pleas court and from administrative agencies must be filed within ten days of the order appealed from unless otherwise specifically provided.¹²⁰

The third step in the preparation for appeal is to file a precipe for a transcript and pay the fee therefor within ten days of the filing of the notice of appeal unless otherwise provided.¹²¹ The clerk is then required to file, in the appellate court, a transcript of the journal entries entered on the record and including the original papers in the case.¹²² If the appellant does not file the transcript with the clerk of the appellate court, the appellate court has the power, upon motion, to direct the trial court wherein a notice of appeal has been filed to file the transcript in the appellate court.¹²³ By amendment to section 1901.30(E) of the Uniform Municipal Court Act, it is provided that the failure of the appellant to file a precipe for transcript and pay the fee therefor within ninety days of the filing of notice of appeal will cause the notice of appeal to be stricken from the files. This would have the effect of terminating the appellant's right to appeal. The appealing party must file a bill of exceptions, if needed to demonstrate the error claimed, within forty days of the filing of the notice of appeal.¹²⁴ When the appellant challenges the judgment as being against the manifest weight of the evidence or contrary to law, the bill of exceptions must contain the certificate of the trial court that it contains all of the evidence received during trial.¹²⁵ The rule for filing bills of exceptions in municipal courts is the same as in common pleas courts in civil cases.¹²⁶ In the county courts, however, the filing of a bill of exceptions, in both civil and criminal cases must be done within ten days of the journalization of the judgment or the overruling of a motion for new trial.¹²⁷ This rule and these sections are applicable for filing bills of exception in criminal cases in the municipal court.¹²⁸ The

118. *Ibid.*

119. *Ibid.*

120. *Ibid.*

121. OHIO REV. CODE §§ 2505.08, 2506.02.

122. OHIO REV. CODE § 2505.08.

123. *Ibid.*

124. OHIO REV. CODE § 2321.05.

125. *Regan v. McHugh*, 78 Ohio St. 326 (1908); *Stevison v. Cummins*, 101 Ohio App. 453, 131 N.E.2d 863 (1956).

126. This is due to the fact that OHIO REV. CODE § 1901.21 makes the provisions of the Code concerning filing of a bill of exceptions in common pleas court (in civil cases) applicable to the municipal courts unless specifically provided otherwise.

127. OHIO REV. CODE §§ 1913.25, .31, .34.

128. SKEEL'S OHIO APPELLATE LAW § 362 (Supp. 1959).

filing of briefs, first by the appellant and second by the appellee, is governed by rule of court.¹²⁹

Some mention of a so-called cross-appeal should be made. Section 2505.22 does not authorize an appellee to file a cross-appeal in the appeal of his adversary in the court of appeals.¹³⁰ If a party feels himself aggrieved by the final order or judgment of the trial court, he must file his own appeal and not attempt to inject himself into the appeal of his adversary. The provisions of section 2505.22 authorize an appellee to file assignments of error to be considered only by the appellate court before a judgment or order is reversed in whole or in part. The supreme court in *Parton v. Weilman*,¹³¹ stated that such assignments of error may be considered by a reviewing court only when necessary to prevent a reversal of the judgment under review. This section does not augment or in any way affect Rule II (C) of the supreme court providing for a cross-appeal, which must be filed within the time for filing a notice of appeal.

Steps to be Taken in Criminal Cases

There are a number of statutes relative to appeals in criminal cases. The rule days in criminal appeals are totally different from those in civil actions. There are also differences to be found in the rule days in appeals from judgments or final orders in the "magistrate's" court as distinguished from appeals from judgments taken to the court of appeals from the common pleas court. Chapter 2945 of the Code deals with procedure in the trial of criminal cases and applies in all cases except where its provisions are made inapplicable by specific statutory provisions dealing with particular courts.

The time for filing a notice of appeal in criminal cases is stipulated in section 2953.05. In all felony cases, the notice of appeal must be filed within thirty days of the judgment (sentence) or thirty days from the overruling of a motion for new trial, if filed, or from the order suspending the imposition of sentence and placing the defendant on probation, whichever is later.¹³² In the "magistrate's" court, the notice must be filed within ten days of the last of such entries.¹³³ After the time has passed for filing an appeal as a matter of right in either a felony case or in a prosecution in a "magistrate's" court, a defendant may seek leave to file an appeal by motion in the court to which it is desired to appeal.¹³⁴

129. Ohio Ct. App. (Civ.) R. VII.

130. *Greenberg v. Snodgrass Co.*, 95 Ohio App. 307, 119 N.E.2d 114, *aff'd*, 161 Ohio St. 351, 119 N.E.2d 292 (1954).

131. 169 Ohio St. 145, 158 N.E.2d 719 (1959).

132. OHIO REV. CODE § 2953.05.

133. *Ibid.*

134. *Ibid.*

Where leave must be secured, a copy of the notice of appeal must be filed in the reviewing court after service on the prosecutor of both motion and notice.¹³⁵

The requirement for filing a precept for a transcript is found in section 2953.03. The amended version of section 2953.03, effective November 6, 1959, requires the clerk of the trial court to make delivery of the transcript to the clerk of the reviewing court. This section is not in harmony with section 2953.04, which requires the appellant to deliver the transcript with his brief and assignments of error to the reviewing court. Before the amendment to section 2953.03, the clerk of the trial court was required to deliver the transcript to the defendant-appellant. The defendant could then comply with the provisions of section 2953.04 by including the transcript with his brief and assignments of error. In the confused situation now confronting the defendant, he should undoubtedly file his assignments of error and brief with the appellate court within five days of filing his precept for transcript in the trial court or seek an order of the reviewing court fixing a time to file assignments of error and brief.

When necessary to demonstrate the error complained of by the defendant, he must file a bill of exceptions in the trial court.¹³⁶ Where the error claimed is that the verdict or decision is not sustained by sufficient evidence, the bill of exceptions must contain all of the evidence.¹³⁷ In other cases, in the appeal from a judgment or final order of the common pleas court, a defendant may present only so much of the record of the trial as he believes is necessary to demonstrate the error. If the reviewing court determines that a complete bill of exceptions is necessary for a proper consideration of the case, it may order the record completed.¹³⁸ No such provision is found in the provision for bills of exception in the "magistrate's" court.

The rule day for filing bills of exception under section 2945.65 (which appears to be applicable only to the common pleas court and the juvenile court) is thirty days from the overruling of a motion for new trial or thirty days from an order suspending the imposition of sentence and putting the defendant on probation, or thirty days from the judgment (sentence), whichever is later. The statutes dealing with county courts, the mayor's courts and police courts require the bill of exceptions to be filed within ten days of the judgment (sentence) or ten days from the overruling of a motion for new trial, if filed.¹³⁹

135. OHIO REV. CODE § 2953.06.

136. OHIO REV. CODE §§ 2945.65; 1913.31, .34.

137. OHIO REV. CODE § 2945.65.

138. *Ibid.*

139. OHIO REV. CODE §§ 2931.15; 1913.31, .34.

With these sections in mind, it becomes necessary to determine the rule for filing bills of exception in municipal courts. Section 1901.21 provides that the practices and procedures when bringing and conducting prosecutions of criminal cases in municipal courts are the same as those appropriate in police courts — or if not there provided, then the practice and procedure of the mayor's court shall apply, or if not there provided, then the practice and procedure in county courts shall apply. This part of section 1901.21 makes clear the legislative purpose to harmonize the criminal procedure of municipal courts with that of all other "magistrate's" courts as defined by section 2931.01, within which definition the municipal court in the exercise of its criminal jurisdiction is included.

This legislative purpose to harmonize the criminal procedure of municipal courts with all other "magistrate's" courts is further supported by the amendment of section 2953.05, effective January 1, 1960, wherein it is provided that notice of appeal in "magistrate's" courts is to be filed within ten days of the judgment or the overruling of a motion for new trial. There is no reason to believe that a trial of a misdemeanor or ordinance violation in a police court, mayor's court or county court should be different than a trial in a municipal court. The law governing the trial of misdemeanors has always dictated that such cases should proceed with reasonable dispatch in the interest of justice. Nor is the effect of section 1901.21 modified by the provisions in section 2938.15. The latter section prescribes that the rules of evidence and procedure in chapter 2945 (common pleas courts) shall prevail in trials under chapter 2938 ("magistrate's" courts) where such rules are not by their nature inapplicable to the trial of misdemeanors and where no special provision is made in chapter 2938. Section 1901.21, however, does make special provision, and although not falling directly within the statutory exception, its specific provisions cannot be set aside by the provisions of 2938.15 which are only general in character.

So it is that section 1901.21 prescribes with unmistakable clarity that the procedure of courts dealing with such like matters as misdemeanors is to be followed in municipal courts. It must therefore follow that a bill of exceptions when needed in an appeal from a judgment of the municipal court must be filed within ten days of the judgment or from the overruling of a motion for new trial in accordance with sections 1913.31 to 1913.34. For this reason the appeal would not be controlled by the thirty-day period provided in section 2945.65 which is the appropriate procedure for felony cases tried in the common pleas court.

Appeals by Indigent Defendants

The obligation of the state to furnish a bill of exceptions for an indigent defendant in a felony case to be taxed as costs has been the subject

of considerable controversy. The Supreme Court of Ohio, in the case of *State v. Frato*,¹⁴⁰ held that "where shorthand notes have been taken in a criminal case as provided in section 2301.20, the defendant therein has the right to a full transcript of the evidence without paying for it in advance."¹⁴¹ In 1959, the Ohio General Assembly amended the sections construed in the *Frato* case so that the trial court in a felony case may, because of poverty of the defendant but not otherwise, order a bill of exceptions for a defendant, the costs to be paid by the county treasurer and taxed as costs in the case.¹⁴² If insufficient time remains after the date of such order to prepare and file a bill of exceptions, the court may extend the time within which to file the bill of exceptions for a period not exceeding thirty days.¹⁴³

These amendments would seem to bring the rights of an indigent defendant found guilty in a felony case in line with the holding of the Supreme Court of the United States in the case of *Griffin v. Illinois*.¹⁴⁴ In that case, it was held that when the general law of a state makes provision for a review or "writ of error" for persons convicted in a criminal trial and where such review can be had only by the use of a bill of exceptions requiring a transcript of testimony to demonstrate the error, failure to provide state funds to an indigent defendant for the preparation of such transcript is a denial of due process and equal protection of the laws under the fourteenth amendment of the United States Constitution.

The law is now clearly established that the refusal of a trial judge to provide transcript for an indigent defendant, where a transcript is available, constitutes an abuse of discretion.¹⁴⁵ The Supreme Court of the United States also held, in the case of *Burns v. Ohio*,¹⁴⁶ that the Supreme Court of Ohio could not refuse an indigent defendant in a criminal case the right to docket an error proceeding for failure to pay the docket fee. A state need not provide for appeals at all, but once it chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. This principle is equally applicable when the state has afforded an indigent defendant access to the initial stage of its appellate procedure but has effectively foreclosed access to the final stage of that procedure solely because of his indigency.

It is to be noted that the Ohio statutes confer the right to obtain a

140. 168 Ohio St. 281, 154 N.E.2d 432 (1958).

141. *Ibid*; also involved were OHIO REV. CODE §§ 2301.23, .25; 2953.03.

142. OHIO REV. CODE § 2953.03.

143. *Ibid*.

144. 351 U.S. 12 (1956).

145. See, SKEEL'S OHIO APPELLATE LAW § 319 (1958); (Supp. 1959 at 78).

146. 360 U.S. 252 (1959).

bill of exceptions at the expense of the state only upon indigents convicted of a felony. There is no law or rule requiring the attendance of an official court reporter in "magistrate's" courts. Therefore, it would seem logical to conclude that the rule would not be applicable in "magistrate's" courts unless an official court reporter is provided.

Stay of Execution and Granting of Bail Pending Appeal

Section 2953.09 covers generally the right to request a stay of execution in a felony case with certain provisions applicable to misdemeanor cases. That section states that in an appeal to the supreme court in a felony case the filing of an appeal suspends the execution of the sentence. In appeals to the supreme court from judgments in misdemeanor cases, the section also provides that "the court or judge allowing the motion [meaning the motion to certify the record] may order such suspension." In all other appeals, to courts inferior to the supreme court, section 2953.09 precludes suspension of execution of sentence pending appeal except by order of a judge or judges sitting on the appellate court.¹⁴⁷

Section 2953.051, effective January 1, 1960, provides that in a misdemeanor or ordinance violation case, where the defendant has been found guilty, the filing of a motion for a new trial or a notice of appeal shall thereby suspend the sentence pending the decision of the motion or the appeal, *if the defendant is then on bail*. Power is conferred upon the trial court or a reviewing court to order new or additional bail. The effect of the enactment of this new section upon the provisions of section 2953.09 has not yet been judicially considered. The new section would seem to apply to successive appeals, both to the supreme court and to inferior appellate courts, and would, therefore, be in conflict with and supersede that part of section 2953.09 dealing with misdemeanor cases.

Section 2953.051 in conferring upon the trial or reviewing court the power to order additional bail is in accord with other provisions in the code of criminal procedure. Admitting a defendant to bail after conviction is at the discretion of the trial court or the appellate court. This controlling rule was announced by the supreme court in the case of *In re Thorpe*.¹⁴⁸

The provisions of Article I, section 9 of the Ohio Constitution guaranteeing the right to bail, are not effective subsequent to judgment of conviction in the trial court.

One convicted of felony is not entitled as a matter of right to be admitted

147. Section 2953.59 states in part: "Appeals in other courts shall not suspend execution of sentence, except in capital cases where such suspension must be for good cause shown, on motion and notice to the prosecuting attorney of the proper county, ordered by a majority of the judges of the court of appeals of the county, and in other cases in such court by one judge thereof, and in cases in the court of common pleas by one of the judges thereof."

148. 132 Ohio St. 119, 5 N.E.2d 333 (1939).

to bail or to have execution of sentence suspended pending appeal of such judgment of conviction in a reviewing court; but the trial court is authorized to suspend execution of sentence and release the defendant upon approved recognizance pending such appeal.¹⁴⁹

Section 2953.10 provides that the common pleas court, the court of appeals or the supreme court, or any judge thereof, to which an appeal is taken from an inferior tribunal has the same power and authority to suspend the execution of a sentence during the pendency of an appeal and to admit the defendant to bail as is possessed by the inferior tribunal. Similarly, section 2953.051 provides that in a misdemeanor conviction or a conviction of an ordinance violation where the defendant is on bail, the filing of a motion for new trial or a notice of appeal stays the execution of the sentence and continues the bail subject to the right of the trial court or the reviewing court to require new or additional bail.

It is provided by section 2949.02 that where a person is convicted of a bailable offense, including misdemeanors and ordinance violations by the common pleas court, or by any court or magistrate, and such person gives notice in writing to the trial court of his intention to "file a petition in review" (meaning an appeal on questions of law), the judge or magistrate may suspend the execution of sentence for such time as is necessary to prepare and file such petition. It is also provided that in bailable offenses, those in which the punishment is less than imprisonment for life, the court may release the defendant on recognizance with sufficient surety on condition that he will appear without delay and abide the judgment and sentence of the court. This section is in part a duplication of those cited concerning suspension of sentence. Courts of appeals are in disagreement as to the application of section 2949.02 in cases where a defendant is found guilty of murder in the second degree. The question is whether a defendant, who has been found guilty of murder in the second degree, can be admitted to bail pending appeal under the provisions of this section. The two cases are *State v. Sheppard*,¹⁵⁰ holding that one found guilty of murder in the second degree and therefore subject to a life sentence cannot be admitted to bail, and *State v. Hawkins*,¹⁵¹ in which case the court of appeals of the seventh district came to a contrary conclusion. A fair interpretation of section 2949.02 would dictate that the criterion for non-bailable offenses was the severity of the sentence, life imprisonment, originally imposed by the court and not the subsequent modification of such sentence on the authority of parol statutes as the *Hawkins* decision found.

149. *Ibid.*

150. 97 Ohio App. 489, 123 N.E.2d 544 (1955).

151. 97 Ohio App. 477, 124 N.E.2d 453 (1954).

Appeals by the Prosecution

The right of the state to appeal from a reversal of a conviction is provided for by section 2953.14. There can be no question, constitutional or otherwise, as to the state's right to such a review. This right is available in a case, where, before the defendant has been put in jeopardy, the action is dismissed and judgment entered for the defendant, such as might occur after a demurrer has been sustained to the indictment and the state does not wish to plead further.

There is, however, considerable controversy with regard to the right of the state to an appeal (on questions of law) when there has been a trial on the merits and the defendant has been found not guilty, or when a dismissal is entered without the defendant's consent after the defendant has been put in jeopardy upon grounds which preclude a second prosecution of the case.¹⁵² Also involved is the right to appeal a final order or judgment of a court of record as provided by the Ohio Constitution.¹⁵³ This problem includes a consideration of the cases in which these sections have been held unconstitutional for the reason that they are in conflict with sections 2 and 6 of article IV of the Ohio Constitution.¹⁵⁴ The purpose of permitting the state to appeal in such cases is to enable the prosecuting attorney or attorney general to contest allegedly erroneous interpretations of law by a trial court, and to obtain a judicial pronouncement of the correct rule of law from a reviewing court. The major argument against the state's right to appeal in an action where the defendant, after having been placed in jeopardy, has been discharged, is that the question has become moot and that there is no justiciable question since the trial court's decision is rendered final by reason of the constitutional provision against double jeopardy. This claim is not logical. According to the Ohio Constitution, a party to an action is entitled to appeal a judgment of the trial court which is adverse to his claims, either as to law or fact.¹⁵⁵ The fact that if the judgment is reversed the defendant cannot be retried because he has been once in jeopardy is because of a wholly separate constitutional provision which the defendant may interject into the case by a plea in bar in a subsequent trial. The decision on review, however, could determine the correct application of the law as found by the reviewing court. This principle was clearly stated in the case of *State v. Orlinski*.¹⁵⁶

When a prosecution is ended in a trial court by a decision on demurrer to an indictment, a plea in abatement or the constitutionality of a statute, for

152. OHIO REV. CODE § 2945.70 (in connection with §§ 2943.36, .67-.69).

153. OHIO CONST. art. IV, § 6.

154. *Eastman v. State*, 131 Ohio St., 1 N.E.2d 140 (1936).

155. OHIO CONST. art. IV, § 6.

156. 21 Ohio L. Abs. 429 (Ct. App. 1936).

illustration, the State is vitally interested and a review of such decision is imperative. Certainly this is true in a case wherein the defendant can not claim former jeopardy. It ought to be likewise true in a case wherein the validity of a statute is involved even though the defendant may claim jeopardy. A judicial determination that a duly enacted statute is valid or invalid, is of as much importance to society, the State, as is the review of a record of conviction and imposition of a sentence to pay a trivial fine and costs.

So we say that all judgments are potentially reviewable with one probable exception. To say that only a record of conviction is reviewable is to say that jurisdiction to review is determinable by the verdict of a jury. The language of Article IV, Section 6 does not warrant such construction. Jurisdiction to review a decision on the constitutionality of a statute should not be contingent on the decision of a jury on the facts.¹⁵⁷

Steps To Be Taken In Juvenile Court Cases

The juvenile court has exclusive jurisdiction in the trial of misdemeanors defined in the Juvenile Court Act.¹⁵⁸ The juvenile court is not a "magistrate's" court as defined by section 2931.01.

It should be pointed out that the juvenile court has both civil and criminal jurisdiction. In dealing with the question of whether a child under eighteen years of age is a neglected, dependent or delinquent child, the court exercises its special jurisdiction, which must be classed as civil in character and is subject, where applicable, to civil procedure, particularly in appeals as provided by section 2501.02. It has also been decided that a bastardy proceeding is civil in character¹⁵⁹ and the procedure on appeal would be as provided in chapter 2505.

Prosecutions of an adult in juvenile court proceed under the rules applicable in criminal cases.¹⁶⁰ An appeal, therefore, follows the procedure provided for appeals from common pleas court in criminal cases. This would mean that sections 2945.65, and 2945.79 to 2945.83, and chapter 2953 must be followed in filing a motion for new trial, bills of exception and notice of appeal.

However, section 2151.52 provides that the sections of the Code relating to appeals on questions of law from the court of common pleas, including the allowing and signing of a bill of exceptions, shall apply to prosecutions of adults in juvenile court. This section also provides that an appeal from the juvenile court shall not be taken to the court of appeals except upon good cause shown, upon motion and notice to the prosecutor as in civil cases, or unless such motion is allowed by such court. If this latter provision of section 2151.52 is interpreted to mean that the court of appeals has the power to refuse the right of appeal without

157. *Id.* at 430.

158. OHIO REV. CODE ch. 2151.

159. *State ex rel. Pennington v. Barger*, 74 Ohio App. 58, 57 N.E.2d 815 (1943).

160. OHIO REV. CODE § 2151.52.

hearing the case on its merits, it raises a serious constitutional question. Every person adjudged a misdemeanor by a court of proper jurisdiction of this state is afforded the right of appeal either by statute or under constitutional authority. Where the court is a court of record, an appeal to the court of appeals is provided.¹⁶¹ A failure to seek leave to appeal under section 2151.52, therefore, should not be held to bar an appeal.¹⁶² The remainder of section 2151.52 merely establishes the procedure on appeal. If it were not there set out, the general sections on appeals would accomplish the same result.

*Steps To Be Taken In
Appeals From the Court of Appeals*

Appeals to the supreme court from judgments of the court of appeals are accomplished by filing notice of appeal in the court of appeals,¹⁶³ and filing a copy of the notice in the supreme court.¹⁶⁴ In a civil case, such notice must be filed within twenty days of the filing of the journal (approved in writing) of the appellate court's judgment with the clerk for journalization.¹⁶⁵ In criminal actions, the time within which the notice must be filed is thirty days from the journalization of the final order or judgment of the court of appeals.¹⁶⁶

The notice of appeal must state the judgment from which appeal is taken.¹⁶⁷ In felony cases it must further state that the appeal is on condition that leave to appeal be granted,¹⁶⁸ and in misdemeanor and civil cases, that it is on condition that a motion to certify be granted.¹⁶⁹ In appeals as of right, where the original jurisdiction of the court of appeals is invoked and those involving constitutional questions where leave to appeal is not necessary, the fact that a constitutional question is presented or that the appeal is one from a judgment entered by the court of appeals in the exercise of its original jurisdiction must be stated.¹⁷⁰

In felony cases a motion for leave to appeal must be filed in the

161. OHIO CONST. art. IV, § 6.

162. The Ohio legislature is at the present time considering an amendment to § 2151.52 which would make appeals from the prosecution of adults in the juvenile court subject to the rules governing appeals on questions of law from the court of common pleas in criminal cases. See S.B. 129 104th General Assembly, 1961-62. This proposal would confer a right of appeal thereby eliminating the power of the court of appeals to dismiss such an appeal without a hearing on the merits. [Senate Bill 129 passed, effective October 6, 1961.]

163. OHIO REV. CODE § 2505.04.

164. OHIO SUP. CT. (Civ.) R. II.

165. OHIO REV. CODE § 2505.07.

166. OHIO REV. CODE § 2953.05.

167. OHIO REV. CODE § 2505.05.

168. OHIO SUP. CT. (Civ.) R. II, § 1(d).

169. OHIO SUP. CT. (Civ.) R. II, § 1(e).

170. OHIO SUP. CT. (Civ.) R. II.

supreme court with a copy of the notice of appeal.¹⁷¹ Payment of the docket fee of twenty dollars must be made at that time and a certificate of service of copies of the notice of appeal and motion must be served on the prosecuting attorney.¹⁷² Where a motion to certify the record is required, it must be filed in the supreme court within ten days of the notice of appeal,¹⁷³ and in misdemeanor cases a certificate must be filed showing that service of copies of the notice and motion has been made on the prosecuting attorney.¹⁷⁴ Where leave to appeal or a motion to certify has been granted, the clerk of the court of appeals shall, upon the payment of the proper fee as provided by section 2503.17, file the transcript of the case in the supreme court. Briefs follow in accordance with Rules II, VII and VIII of the supreme court.

Where the case heard in the court of appeals was on the facts, that is, an appeal on law and fact, or where the case is one in which the court of appeals exercised its original jurisdiction, as in an action in quo warranto, a bill of exceptions may be necessary to demonstrate the error in the supreme court. The bill of exceptions must be filed in the court of appeals, as provided by section 2321.05, amended effective August 17, 1961, and Rule X of the supreme court. However, a bill of exceptions is not necessary where the case was tried in the court of appeals on a stipulation of fact filed with the papers in the case or where the appeal is based on the claim that the findings of fact do not support the conclusions of law made by the court and the court's findings are made part of the record.¹⁷⁵ When there is any doubt as to the need for a bill of exceptions, such doubt should be resolved in favor of filing the bill.¹⁷⁶

Where a motion to certify the record is filed in the supreme court, or where an appeal on questions of law is made as of right followed by a motion to dismiss which challenges this right, a bill of exceptions must be filed in the court of appeals within twenty days from the order allowing the motion to certify the record or from the order overruling the motion to dismiss the appeal.¹⁷⁷ In the case of an appeal as of right, where the court's original jurisdiction was invoked, a motion to dismiss is not appropriate, and the bill of exceptions must be filed within forty days of the notice of appeal. Similarly, the bill of exceptions must be filed within forty days of an order to certify the record on the grounds of conflict where the case in the court of appeals was on law and fact.¹⁷⁸

171. OHIO SUP. CT. (Crim.) R. VII, § 1.

172. *Ibid.*

173. OHIO SUP. CT. R. (Civ.) VIII § 1.

174. OHIO REV. CODE § 2953.06.

175. OHIO REV. CODE § 2505.30.

176. *Viering v. Scott*, 152 Ohio St. 211, 88 N.E.2d 921 (1949).

177. OHIO REV. CODE § 2321.05 (as amended, effective Aug. 17, 1961).

178. *Ibid.*

Of course, where the case was an appeal to the court of appeals from a trial court on questions of law, such case on appeal to the supreme court must be heard on the record as it came to the court of appeals. This would include the bill of exceptions, if filed and allowed by the trial court.¹⁷⁹ This record presented to the court of appeals from the trial court cannot be modified or changed by additions or deletions on appeal to the supreme court.

CONCLUSION

It is to be noted from the foregoing consideration of appellate procedure that a great deal has been accomplished to modernize and simplify appellate law. The notice of appeal is now the only jurisdictional step necessary to invoke the jurisdiction of the reviewing court. The stated purpose of those who have guided the changes in procedural law has been to permit one trial and one review. While this purpose has not been completely accomplished by present constitutional and statutory provisions, it has been accomplished in the great majority of the cases.

There are two problems in appellate procedure in Ohio which above all others should be given further study. The first is the requirement of a bill of exceptions. This requirement in most cases entails a considerable expenditure often to the point where a litigant is unable to meet the expense, with the result that the right to judicial review is lost. It is, of course, essential that enough of the record be presented on appeal to demonstrate the error claimed. A reviewing court should, however, have some voice in determining what is needed when considering the errors claimed. The rule requiring all of the evidence to be presented to a reviewing court where the weight of the evidence is in question is unnecessary and wasteful in the case in which one-half of a long record is medical testimony that is not questioned. This subject is in need of complete revision in the interests of justice.

The second major problem concerns the constitutionality of law and fact appeals following the 1944 amendment to article IV of the Ohio Constitution. The deletion from section 6, which sets forth the jurisdiction of the court of appeals, of the phrase, "jurisdiction in the trial of chancery cases" raises a serious question of the constitutionality of law and fact appeals. The opinion in *Youngstown Municipal Railway v. Youngstown*¹⁸⁰ did not settle this question. Only a review by the supreme court will resolve this constitutional ambiguity.

179. *Ibid.*

180. 147 Ohio St. 221, 70 N.E.2d 649 (1946).